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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN DARIO ACOSTA,

Defendant and Appellant.

B162007

(Los Angeles County
Super. Ct. No. NA051415)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Mark C. Kim, Judge. Affirmed.

Kathy M. Chavez, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert A. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D.
Matthews, Supervising Deputy Attorney General, and Adrian N. Tigmo, Deputy Attorney
General, for Plaintiff and Respondent.

Adrian Dario Acosta appeals his conviction for one count of first-degree murder and four counts of attempted murder. Acosta contends the trial court erred in three ways: (1) restricting critical evidence proffered by Acosta that he was intoxicated three hours after the crimes were committed; (2) admitting evidence proffered by the prosecution that fear prompted a victim to relocate his family and cease communication with his gang-affiliated friends; and (3) categorically overruling Acosta's objection and motion to withdraw the jury instruction about transferred intent after the prosecution misstated this law. For reasons expressed below, the trial court did not commit prejudicial error. Accordingly, we affirm.

FACTUAL/PROCEDURAL HISTORY

The Crimes. Edgar Varela lived in a building adjacent to the apartment complex where his parents resided in Long Beach, California. Varela walked over to his family's residence at around 7:00 pm on December 24, 2001, to celebrate his birthday. While Varela walked up a flight of stairs to reach his family's residence, he noticed Adrian Dario Acosta ("appellant"), walking down the same stairwell. Appellant confronted Varela and asked if Varela had a problem with him. Varela replied, "No, I don't. I have a family now." This question arose because Varela was a member of a tagging crew that rivaled one to which appellant belonged. After Varela responded, he and appellant shook hands and proceeded on their different ways. Varela remained upstairs with his family for some time, but then walked downstairs and outside to a porch where he met some friends and smoked a cigarette. Three friends who joined Varela, Jorge Moreno, Wesley Melendez, and Daniel Arroyo, belonged to Varela's gang-tagging crew (collectively the "tagging crew"). He was also joined by another friend Marco Camacho who was not a member of the tagging crew.

While outside, this group saw appellant walking down the street with a female at some point in time between 8:35 p.m. and 8:40 p.m. Varela's friends discussed among themselves whether they had some previous familiarity with appellant. Arroyo remarked

appellant “socked” him a couple of weeks before. At around 8:50 p.m. appellant returned, carrying a revolver. Varela noticed appellant came from his right side and eventually stopped behind two parked cars in front of the apartment.

Appellant fired the gun six times at the group. At the time of the shooting, Varela and his friends were not standing together in a group, but instead they were dispersed between the street in front of Varela’s apartment and the porch. At some point during the shooting, the gun jammed. After an appreciable pause, appellant fixed the gun and resumed firing at the group. As a result of the shooting, Camacho was killed, Arroyo suffered a stomach wound, and Melendez was shot in the upper right shoulder. Appellant then ran away.

When the police arrived at the crime scene, they compiled evidence and took statements from the witnesses. The police arrested appellant approximately three hours after the shooting; at the time of his arrest appellant was at home with his family. According to the police, appellant was “sobbing profusely” when he was arrested and appeared intoxicated.

Trial Proceedings. At trial, Melendez and Varela identified appellant as the shooter.

During another portion of the proceedings, the prosecution filed a motion to exclude as irrelevant evidence of appellant’s intoxication at the time of his arrest. Appellant objected, believing his intoxication relevant to his “state of mind” at the time he committed the crimes. The court concurred with the prosecution on Evidence Code section 352 grounds, but left open the possibility to revisit the issue later. At that particular time, however, the judge called evidence of appellant’s intoxication “speculation.”

Varela also testified during the trial. On cross-examination, appellant asked Varela questions that challenged the extent to which he remembered the incidents that occurred on December 24, 2001. Specifically, appellant asked whether Varela had conversed with Melendez, Arroyo or Moreno at any time after the shootings. Varela answered in the negative. On redirect examination, the prosecution inquired into why

Varela ceased communication with his tagging crew. Over appellant's objection, Varela testified that he moved away from the neighborhood where the crimes occurred and no longer conversed with his tagging crew because he feared for his safety and that of his family. Over appellant's objections, the court allowed this testimony.

During the prosecution's subsequent opening summation, the prosecutor referred to the law on transferred intent. The prosecutor said that appellant "doesn't have to have wanted to kill each and every one of them. All he had to have wanted was to kill one of them. And in doing that, his intent transfers to all the victim[s], all the people standing there." After the prosecutor's closing argument, appellant requested a sidebar to object to the misstatement of the transferred intent doctrine. At the sidebar, appellant argued that transferred intent is "no longer of value once you succeed in killing your target and killing him." Subsequently, appellant sought withdrawal of the transferred intent instruction. The court overruled appellant's motion to withdraw the transferred intent instruction.

The jury found appellant guilty of five charges. Count I was a murder charge for the death of Camacho, pursuant to Penal Code section 187, subdivision (a). Counts II through V found appellant guilty for the premeditated and deliberate attempted murders of Melendez, Arroyo, Moreno, and Varela, respectively.

Acosta appeals.

DISCUSSION

I. The Trial Court Did Not Commit Error By Excluding Evidence Concerning Appellant's Intoxication After the Crime

Appellant alleges that he was denied the right to a fair trial because by excluding evidence of his intoxication, the court precluded him from presenting a complete defense. He also asserts that the intoxication evidence was relevant to establishing his state of mind at the time he committed the crimes. We disagree.

A. The Exclusion of Intoxication Evidence Did Not Preclude appellant From His Constitutional Right to a Fair Trial

Denial of the opportunity for a criminal defendant to present a complete defense raises constitutional concerns. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; internal citations omitted.)

Case law has refined and shaped the characteristics necessary to ensure that a criminal defendant receives the opportunity to present a complete defense. In *Crane v. Kentucky*, the United States Supreme Court emphasized that a complete defense turns on the centrality of the evidence “to the defendant’s claim of innocence.” (*Ibid.*)

Here, the court did not deprive appellant of a complete defense by excluding evidence of his inebriation at the time of his arrest. The California Supreme Court has advised that the “[a]pplication of the ordinary rules of evidence ... does not impermissibly infringe on a defendant’s right to present a defense.” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; internal quotations omitted.) Hence any discretionary decisions rendered by the trial judge in this case concerning the impact of appellant’s intoxication upon his state of mind pose evidentiary concerns and thus remain outside the purview of constitutional concerns of presenting a complete defense.

Additionally, appellant declined to affirmatively make his intoxication a central issue in the case. The court did not categorically exclude evidence of appellant’s intoxication. In fact, the trial judge explicitly left open the possibility of returning to the issue if appellant asserted intoxication as an affirmative defense. Appellant, however, did not later raise intoxication as an affirmative defense. Accordingly, appellant’s claim he was deprived of a complete defense is without merit.

B. The Intoxication Evidence Proved Irrelevant

Appellant also contends that, even if this court finds that he was not denied his right to a complete defense, the evidence of intoxication was relevant to assessing his state of mind at the time he committed the crimes. Appellant suggests that his intoxication reveals remorse and regret -- compelling traits that offer negating his intent to kill.

Evidence Code section 210 defines “relevant evidence” as “evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”¹ Evidence is irrelevant if it invites speculation -- “[i]f the inference of the existence or nonexistence of a disputed fact which is to be drawn from proffered evidence is based on speculation, conjecture, or surmise, the proffered evidence cannot be considered relevant evidence.” (*People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 47.)

As the trial court properly concluded, appellant’s intoxication was irrelevant because it did not prove, nor support the inference, that he was drunk at the time he committed the crimes. Absent a specific factual showing of the circumstances surrounding appellant’s intoxication it would be speculative to assume appellant’s drunkenness three hours after the shooting had any connection to his state of mind when he committed the crimes. Importantly, appellant could have obtained such evidence through direct or circumstantial evidentiary means, thereby reducing the speculative nature of the inference. Appellant declined to testify, which precluded the court from receiving direct evidence regarding the circumstances regarding his inebriated state. However, in the absence of direct evidence, other means existed to provide the details of appellant’s drunkenness. Appellant could have subpoenaed family members present in

¹ The definition of “relevancy” is necessary to contextualize California Evidence Code section 350, which succinctly reads, “No evidence is admissible except relevant evidence.”

the house when he was arrested. Appellant could have also subpoenaed the female who accompanied him on his first walk in front of Varela's apartment at some point between 8:35pm and 8:40pm, as this would have assisted in the determination whether appellant had been drinking, and the depths of his inebriated state, about ten to fifteen minutes before he returned to commit the crimes. Appellant failed to exhaust any of these options, thereby leaving inferences too attenuated to be considered relevant.

In any event, even if this court found this evidence relevant to appellant's state of mind, the evidence was properly excluded under Evidence Code section 352.² As stated in *Kessler v. Gray*, the balancing of probative value versus prejudicial harm is a process that "requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case" (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.) The trial court properly excluded evidence of intoxication as to appellant's state of mind because it recognized the potential for extreme prejudice. The prejudice stems from the jury's potential to accept an irrelevant inference linking appellant's post-crime drunkenness with his state of mind at the time he committed the crime.

In view of the foregoing we conclude the court did not abuse its discretion in excluding the evidence of intoxication.

II. The Trial Court Did Not Commit Prejudicial Error By Admitting Evidence Pertaining to Varela's Fear

Appellant also contends that the prosecution elicited irrelevant evidence when Edgar Varela stated that fear prompted him to relocate his family and cease

² Evidence Code section 352 reads: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

communication with his gang-affiliated friends after the events of December 24, 2001. We disagree.

While trial courts maintain broad discretion to determine evidentiary issues, it cannot admit irrelevant evidence. “Irrelevant evidence must be excluded; a trial court has no discretion to admit it.” (*People v. Thompson* (1981) 127 Cal.App.3d 13, 18; internal citations omitted.)

Evidence regarding Varela’s fear proved relevant in the instant case. On cross-examination, appellant attempted to impeach Varela by challenging his memory of the incidents of December 24, 2001, to undercut Varela’s credibility as a reliable witness. Appellant posed questions to Varela about the extent to which he continued to communicate with his gang-affiliated friends after the shootings. Based on the nature of these questions, appellant sought to imply Varela had a motive and opportunity to manufacture testimony in an effort to create a consistent story among the victims for purposes of ensuring appellant, a rival gang member’s conviction.

In an effort to rehabilitate Varela on redirect examination, the prosecution inquired into why Varela ceased communication with his tagging crew. Over appellant’s objection, Varela testified that he moved away from the neighborhood where the crimes occurred and no longer conversed with his tagging crew because he feared for his safety and that of his family. This testimony demonstrated that Varela wanted to disassociate himself from the very people with which appellant suggested he conspired. The probative value of such testimony stems from his articulated desire to shun gang interests and rivalries. Accordingly, the testimony elicited by the prosecution during redirect examination falls squarely within the definition of relevancy, as defined by Evidence Code section 210, because it has a tendency to prove “the credibility of a witness.”

Despite its relevancy, appellant asserts that Varela’s testimony regarding fear was prejudicial. In appellant’s view, this testimony gave rise to a speculative and erroneous inference appellant was a malicious individual and may have sought to retaliate against Varela. He points out that any such inference was prejudicial because appellant had been

incarcerated since the time of his arrest. The prosecution denied any intent to create such an inference.

While on the one hand, Varela's testimony might lead to the inference appellant was the underlying source of Varela's fears; nevertheless, we observe the jury could have also arrived at a countervailing, non-prejudicial inference. Varela's fear could have led the jury to conclude that Varela would say anything to keep appellant incarcerated as long as practicable. Such an inference would not be prejudicial to appellant and instead it would serve simply to undermine Varela's credibility. Thus, this fear is susceptible to two reasonable interpretations, one of which would not have prejudiced appellant.

The Trial Court Committed Harmless Error. The trial court's determinations will not be overturned unless they proved prejudicial. "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (*People v. Watson* (1956) 46 Cal.2d 818, 834; internal quotations omitted.) The court in *Watson* determined that a "miscarriage of justice" has occurred if a "different verdict would not have been improbable had the error not occurred." (*Id.* at p. 836.)

Assuming the jury adopted the negative inference from the fear evidence, we nevertheless conclude, appellant would not have obtained a different verdict absent the error. The evidence against appellant was strong. In addition to Varela, the other victims testified at trial. Melendez identified appellant in court as the shooter on the night of December 24, 2001. Furthermore, Moreno and Arroyo each testified that at some point while appellant was shooting at them, his gun jammed. Appellant, nevertheless, fixed the gun and proceeded to shoot at Varela's group of friends—a testament to his deliberate and calculated intent to kill the group.

For the foregoing reasons, the trial court did not commit prejudicial error by allowing Varela to testify about his fear on redirect examination.

III. The Trial Court Did Not Commit Prejudicial Error By Failing to Withdraw the Jury Instruction Concerning Transferred Intent

Appellant contends the trial court erred in failing to withdraw the jury instruction relating to transferred intent and consequently, it prompted the jury to bypass important factual inquiries in reliance on a more relaxed legal doctrine. Such reliance, appellant asserts, lessened the burden of proof on the prosecution.

Misstatement of the Law Served as a Basis for Objection. On appeal, appellant asserts that the prosecutor, in her closing argument, misstated the law concerning transferred intent by suggesting the doctrine applied to attempted murder. Appellant is correct.

In the instant case, immediately before closing arguments began, the judge instructed the jury as to the law on transferred intent. The judge's instruction comported precisely with CALJIC No. 8.65.³ Thereafter, during closing arguments, the prosecutor offered a method of understanding the doctrine of transferred intent, explaining Acosta "doesn't have to have wanted to kill each and every one of them. All he had to have wanted was to kill one of them and in doing that, his intent transfers to all the victim[s], all the people standing there." At the conclusion of the prosecution's closing argument, appellant requested a sidebar where she objected to the misstatement of the transferred intent instruction and subsequently, asked the judge to withdraw the instruction. The judge overruled the motion.

The prosecutor's suggestion the transferred intent doctrine can be applied to attempted murder is not the law. The transferred intent doctrine does not apply to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 317 ["the doctrine [of transferred intent] does not apply to an inchoate crime like attempted murder"].) Thus

³ CALJIC No. 8.65 reads as follows: "When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed."

the transferred intent doctrine is triggered only when an inadvertent victim *dies*. With the unavailability of transferred intent for attempted murder, an intent analysis becomes target-specific. The *Bland* court explained that when a single act is alleged for the attempted murder of more than one individual, “the intent to kill should be evaluated independently as to each victim, and the jury should not be instructed to transfer intent from one to another.” (*Id.* at p. 327; internal quotations and citations omitted.)

This notwithstanding, the trial court did not commit error in response to appellant’s motion and request to withdraw the transferred intent instruction. “The law generally requires not only a timely but a *specific* objection or motion to preserve an issue for appeal.” (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1468.) In the instant case, appellant offered a *blanket* motion to withdraw the transferred intent instruction. Appellant’s request was overbroad because the transferred intent instruction applied to Count I, the murder charge for killing Camacho. As illustrated in CALJIC No. 8.65, the death of an unintended victim triggers the applicability of the transferred intent doctrine. The circumstances surrounding his death raised legitimate questions about who appellant intended to kill on December 24, 2001. Appellant, after all, unloaded approximately six bullets in the general direction of Varela, Moreno, Melendez, Arroyo, and Camacho. The mere multitude of people in front of Varela’s apartment on December 24, 2001, presents questions of fact as to who Acosta primarily targeted.

Indeed, the court observed, “we don’t know who [appellant’s] intended target is In this case, you got five victims. We don’t know who the targeted victim was other than they were all standing there.” Hence, the complexity of facts surrounding the intent to kill indicated that the court did not err in denying appellant’s generalized motion to withdraw the transferred intent instruction as it applied to Count I.⁴

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Notwithstanding the fact that appellant did not make a specific request to limit or modify the instruction to reduce the potential it would be misapplied to the attempted murder counts, the trial court could and should have limited the transferred intent instruction to the murder in Count I.

In any event, any error committed by the trial court did not result in prejudice. Examination of the entire cause leads this court to believe that a different verdict would not have been reached absent the error.

Prior to instructing the jury as to the governing laws, the judge explained that the law as articulated by the judge trumps any permutation of the law expressed by the attorneys. The judge stated to the jury, “You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.” This admonition provided the jury with sufficient and explicit notice that the judge, not the attorneys, instructs the jury as to the law.

In addition, in light of the prosecution’s entire closing argument, the impact of the prosecution’s misstatement of the law on transferred intent probably proved minimal. The record reflects that the prosecution’s opening summation during closing argument spanned 188 lines of transcript. The prosecution’s misstatement of the transferred intent law comprised only six lines. In other words, only about 3 percent of the prosecution’s opening summation during closing argument had been tainted. The passing reference to the doctrines cast doubt upon a claim of prejudice.

Finally, the evidence of appellant’s individualized intent with respect to each of the attempted murder charges is convincing. Appellant walked passed Varela and his friends between 8:35 p.m. and 8:40 p.m. on December 24, 2001. Approximately fifteen minutes later, appellant returned with a gun. He fired six shots directly at the group. The victims stood at appreciable distances from one another, thereby revealing the deliberate nature of appellant’s actions. Moreover, appellant paused during the sequence of shots because his gun jammed. He had an opportunity to reflect and stop his actions and yet he resumed shooting. The evidence of appellant’s conduct during the crimes is sufficient to support a finding he possessed the requisite intent to kill each victim. Thus, even in absence of any error with respect to the argument on the law or legal instructions

concerning transferred intent, we are satisfied the jury would have convicted appellant on the attempted murder counts.

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.